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No. 85-926

# In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTIAN BROADCASTING NETWORK, INC.,
PETITIONER

*v.*

COPYRIGHT ROYALTY TRIBUNAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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Petitioner is one of numerous claimants to the cable television royalty fund distributed for 1979, 1980, and 1982 by the Copyright Royalty Tribunal pursuant to the Copyright Act of 1976, 17 U.S.C. (& Supp. II) 101 *et seq.* Petitioner, alone among these claimants (see page 3 note 2, *infra*), seeks review of the court of appeals' decision affirming the Tribunal's awards. It contends that the Tribunal's procedures were improper and that the Tribunal engaged in unconstitutional religious discrimination.

1. The Copyright Act establishes a system of compulsory licensing for secondary transmissions of programs by cable television stations. See 17 U.S.C. 111(d). Under the Act, the Copyright Royalty Tribunal is responsible for annually distributing to copyright owners the royalty fees deposited with the Register of Copyrights by cable television operators. See 17 U.S.C. 111(d)(2)-(4). In implementing this system, the Tribunal, which is part of the legislative branch (see

17 U.S.C. 801(a)), is necessarily required to make "inherently subjective judgment calls and [engage in a] rough balancing of hotly competing claims" (Pet. App. 37a). "[R]ough justice in dividing up the royalty pie seems to be the inevitable result of the process that Congress ordained" (*id.* at 9a), and "royalty awards * * * [must only be] within a 'zone of reasonableness'—not unreasonably high or unreasonably low" (*ibid.* (citation omitted)). Royalty awards of the Tribunal are subject to judicial review in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 701 *et seq.* See 17 U.S.C. 810; Pet. App. 8a-9a.

The Copyright Act encourages claimants to come to an agreement concerning the proper distribution of the royalty fund. See 17 U.S.C. 111(d)(5)(A).[1] If no controversy exists over the distribution, the Tribunal "shall * * * distribute such fees to the copyright owners entitled [to receive the awards]." 17 U.S.C. 111(d)(5)(B). If a controversy does exist, the Tribunal "conduct[s] a proceeding to determine the distribution of royalty fees" (*ibid.*); "[d]uring the pendency" of that proceeding, the Tribunal "shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy" (17 U.S.C. 111(d)(5)(C)).

2. This consolidated proceeding in the court of appeals concerned the Tribunal's awards for 1979, 1980, and 1982. The royalty fund for 1982, which was the largest of the three

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[1]Section 111(d)(5)(A) provides in pertinent part:

> Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

years at issue, amounted to $45 million (Pet. 13). The Copyright Royalty Tribunal awarded 1% of the fund for 1982 to petitioner and two other claimants who produce religious programs (Pet. App. 34a).[2] This represented an increase from the Tribunal's award of .35% to these claimants for the years 1979 and 1980 (*id.* at 10a, 20a). The court of appeals upheld the 1% award to the religious claimants for 1982, rejecting petitioner's argument that the Tribunal's procedure for the distribution of the fund was invalid (*id.* at 35a-36a). In addition, the court of appeals found no evidence to support petitioner's claim that the Tribunal's decisions were based on an unconstitutional hostility toward religious broadcasting (*id.* at 37a).

3. Petitioner renews its attack on the Tribunal's method of determining the distribution of the royalty fund for 1982.[3] Petitioner fails to make clear, however, which of two distinct parts of the procedure it is challenging. Nevertheless, whichever aspect is in question, petitioner's argument is without merit, and further review would be unwarranted.

a. In the 1982 proceeding, all claimants except the religious programmers and one other reached an agreement as to the distribution of the royalty fund. The total claims of the nonsettling parties constituted less than 10% of the fund. Accordingly, the Tribunal distributed 90% of the fund

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[2]In the proceedings below, the three religious programmers were designated as the Devotional Claimants (Pet. App. 9a-10a n.4). Petitioner is the only one of this group to seek further review. However, the other two Devotional Claimants, the Old Time Gospel Hour and PTL Television Network, have submitted a brief as respondents in support of petitioner.

[3]Petitioner does not contest the court of appeals' ruling that substantial evidence supports the Tribunal's determination of a 1% award to petitioner (Pet. App. 29a, 34a-35a). Likewise, petitioner does not seek review of the part of the court's decision that rejected its statutory challenges to the Tribunal's awards for 1979 and 1980 (*id.* at 9a-29a).

to the settling claimants in accordance with their agreement, and it conducted a proceeding to determine the entitlement to the remaining 10%. Pet. App. 35a. Petitioner may be challenging the 90% distribution to the settling claimants prior to the final resolution of the controverted portion of the fund. Any such contention is foreclosed, however, by the text and policies of the Copyright Act.

17 U.S.C. 111(d)(5)(C) expressly provides that "[d]uring the pendency" of a proceeding to resolve a controversy concerning the distribution of the royalty fund, the Tribunal "shall withhold from distribution" the amount that is disputed "but *shall have discretion to proceed to distribute any amounts that are not in controversy*" (emphasis added). Here, the Tribunal set aside 10% of the fund as the total amount that the nonsettling claimants were requesting, and it distributed to the settling claimants the 90% of the fund that was not in controversy. This procedure was explicitly authorized by the Act. See *ACEMLA* v. *Copyright Royalty Tribunal*, 763 F.2d 101, 108 (2d Cir. 1985).

As the court below recognized (Pet. App. 8a, 36a), the Act encourages the parties to settle their claims to royalties. However, it "would effectively eliminate the likelihood for settlements if [a court] accepted [petitioner's] contention that when one claimant—no matter how modest that claimant's likely share under even the most sanguine view—chooses not to settle with the other claimants, all awards would thereby be in controversy and a full hearing on all claims would be required" (*ibid.*). The voluntary settlement of these complicated disputes is an important part of the statutory scheme and is inconsistent with the "litigation-to-the-hilt" approach (*id.* at 38a) of royalty fund claimants that the court of appeals decried (*id.* at 37a-38a). The prompt distribution of the "90% of the fund" that was "never claimed [by the nonsettling parties]" (*id.* at 36a) is fully consistent with the congressional purpose of encouraging settlements.

b. Petitioner may also be challenging the Tribunal's ultimate distribution of the contested 10% of the royalty fund. The Tribunal determined that petitioner and the other two religious programmers had established a 1% entitlement to the fund, that another party was also entitled to a 1% award, and that the remainder would be distributed to the settling claimants in accordance with their agreement. Petitioner appears to be arguing that the Tribunal erred in distributing this portion of the royalty fund to the settling claimants without requiring them to prove their claims. However, for the reasons previously discussed, any such contention is contrary to the statutory objective of encouraging voluntary resolution of these disputes by allowing parties to agree to the apportionment of "any part of the fund not in controversy" (Pet. App. 36a). As the Tribunal explained, the voluntary agreement of the other parties meant that "the only controversy to be determined by the Tribunal was what award, if any, to make to [petitioner]." 49 Fed. Reg. 37653 (1984); App., *infra*, 2a.[4]

In any event, contrary to the central premise of petitioner's argument, the Tribunal did have evidence of the claims of the settling parties. In this case, the settling claimants introduced the records of the earlier Tribunal proceedings for the years 1978-1981 and agreed to accept the same proportionate shares for 1982 that they were to be awarded for 1979 and 1980 (which proceedings were then in progress following remand from the court of appeals (see Pet. App. 41a-87a)). See 49 Fed. Reg. 37653-37654 (1984); App., *infra*, 1a, 2a. The Tribunal specifically rejected petitioner's contention "that the record of the 1982 proceeding 'is

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[4]The relevant portion of the Tribunal's 1982 decision has been omitted from the appendix to the petition (the appendix skips from Pet. App. 88a to 91a). For the convenience of the Court, we have reprinted the omitted material from 49 Fed. Reg. 37653-37654 (1984) in an appendix to this memorandum.

devoid of any evidence upon which to base an award to [the settling claimants]' " and "that other parties 'have only put in rebuttal and surrebuttal evidence against' [petitioner]" (*id.* at 2a). Rather, it noted that "20,194 transcript pages of prior distribution proceedings" were "incorporated into the 1982 record"[5] and that petitioner "made no showing that the collective situation of the other [claimants] change[d] in 1982" (*id.* at 3a).

For this reason, the decision below does not, as petitioner asserts, conflict with the decision of the Second Circuit in *ACEMLA* v. *Copyright Royalty Tribunal, supra*. There, the court set aside a Tribunal award to settling claimants who had made no showing of their right to the amount in controversy (763 F.2d at 109). Whatever the correctness of the Second Circuit's decision, it is not in conflict with the decision in this case, since the settling claimants here did adduce proof of their claims.[6]

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[5]Petitioner did not object to the admission of this material. See 1982 Tr. 5-6.

[6]We also note that *ACEMLA* involved the distribution of jukebox rather than cable royalties and therefore arose under 17 U.S.C. 116. Section 116(c)(4)(B), upon which the Second Circuit specifically relied (763 F.2d at 104, 108-109), provides that the "fees to be distributed shall be divided * * * in such pro rata shares as [the performing rights societies] shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share *to which such performing rights societies prove entitlement*" (emphasis added). No comparable provision is contained in Section 111 governing cable copyright awards.

Respondents supporting the petitioner (see page 3 note 2, *supra*) argue that the Acting Chairman of the Copyright Royalty Tribunal conceded in testimony to a congressional subcommittee that the decision below conflicts with *ACEMLA*. However, that testimony—which preceded the decision in this case—simply noted that, because of the possibility that a legal issue could arise in more than one circuit, the Tribunal might be "faced with a potential split" of authority; for that reason, the Tribunal recommended that Congress amend the Copyright Act to provide for exclusive review in the District of Columbia Circuit.

4. Also without merit is petitioner's assertion that the Tribunal's decisions were based on religious discrimination and that the court of appeals failed to give adequate consideration to this issue. The court of appeals specifically addressed petitioner's argument and expressly found "no evidence to support the proposition that [petitioner] was not awarded its 'fair share' of copyright royalties, * * * much less that this alleged shortfall resulted from anti-sectarian sentiments harbored by the Tribunal" (Pet. App. 37a); indeed, as the court noted (*ibid.*), the 1982 award represented an approximately three-fold increase in petitioner's share over prior years, which is "scarcely suggestive of hostility to [petitioner]." There is no reason for this Court to review the court of appeals' fact-bound conclusion that it could "find no evidence" to support petitioner's allegation of bias (*ibid.*).[7] Petitioner's aspersions upon the adequacy of the court of appeals' review are unfounded and clearly belied by the court's careful and extensive consideration of the issues in this and the prior related cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

JANUARY 1986

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[7]Petitioner particularly complains about the Tribunal's reference to a scriptural passage. But as its context makes clear, this isolated portion of the Tribunal's opinion was in response to the court of appeals' earlier criticism of the Tribunal's previous award decision; as the court correctly understood, it does not constitute evidence of religious discrimination against petitioner. Cf. *ACEMLA*, 763 F.2d at 103 & n.*.

## APPENDIX

The appendix to the petition (see Pet. App. 88a-91a) omits the following portion of the decision of the Copyright Royalty Tribunal concerning the distribution of fees for 1982 (49 Fed. Reg. 37653-37654 (1984)):

> royalty fees for the period January through December 31, 1982.
>
> **Background and Chronology**
>
> On May 6, 1983, the Motion Picture Association of America, the Joint Sports Claimants, the Public Broadcasting Service, the Music Claimants and National Public Radio (the "Settling Parties") filed with the Tribunal an agreement in which they agreed to seek in the 1982 distribution proceeding a single aggregate award which would be divided among them "in the proportions determined by their individual Phase I awards in the 1979 and 1980 distribution proceedings (with the proviso that NPR's share shall not be reduced below 0.25 percent of the total funds)." Subsequently the National Association of Broadcasters and the Canadian Claimants agreed to resolve the Phase I proceeding on the basis of the Tribunal's 1979 and 1980 awards. These agreements contemplated that any award to the Devotional Claimants in this proceeding should be accomplished by a pro rata reduction of the shares of other parties.
>
> As in prior distribution cases, the Tribunal conducted the proceedings in two phases. In Phase I the Tribunal receives evidence concerning the awards to general categories of claimants, while in Phase II it receives evidence concerning disputes within categories. The Tribunal held evidentiary hearings on Phase I and Phase II issues, including rebuttal cases, on July 17, 18, 24, 25, 26 and August 2, 3, 6, 7.

The Tribunal directed parties to submit proposed findings of fact and conclusions of law on August 22, 1984. Reply findings were received on August 31, 1984.

The Tribunal incorporated the Phase I and Phase II records of the 1978, 1979, 1980, and 1981 cable distribution proceedings into the record of the 1982 proceeding.

On September 6, 1984, the Tribunal granted the motion of the Turner Broadcasting System, Inc. to intervene in the Phase II proceeding.

**Phase I**

*Structure of Phase I Cases*

We begin with the argument advanced by the Devotional Claimants[1] that the record of the 1982 proceeding "is devoid of any evidence upon which to base an award to any claimant group other than PBS and the Devotional Claimants." The Devotional Claimants assert that other parties "have only put in rebuttal and surrebuttal evidence against the Devotional Claimants." Devotional Claimants conclude therefore that no award can legally be made to these parties.

We find no merit in the argument of the Devotional Claimants, which in our view reflects a myopic view of the matters to be determined by the Tribunal in this Phase I proceeding. All Phase I parties, other than Devotional, in a series of voluntary agreements determined the Phase I awards. Since these agreements did not include the Devotional Claimants, the only controversy to be determined by the Tribunal was what award, if any, to make to the Devotional Claimants.

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[1]Devotional Claimant's Proposed Findings of Fact and Conclusions of Law, pp 37-39.

We also reject the argument that the 1982 Phase I record provides no basis for an award to most other categories of claimants. The Tribunal incorporated into the 1982 record 20,194 transcript pages of prior distribution proceedings. Devotional Claimants made no showing that the collective situation of the other Phase I parties changes in 1982.